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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

KPM Analytics North America Corporation,)	
Plaintiff,)	
)	
vs.)	Civil Action No. 21cv10572-MRG
)	
Blue Sun Scientific, LLC,)	
The Innovative Technologies Group & Co., Ltd., Arnold Eilert, Michelle Gajewski, Robert Gajewski, Rachael Glenister, Gregory Israelson, Irvin Lucas, and Philip Ossowski,)	
Defendants.)	

BEFORE: The Honorable Margaret R. Guzman

Motion Hearing

United States District Court
Courtroom No. 2
595 Main Street
Worcester, Massachusetts
February 28, 2024

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on behalf of the Defendants, Arnold Eilert, Robert Gajewski,
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18 Also present:

19 Irvin Lucas
20 Robert Gajewski
21 Robert Wilt

21 Also present: (via telephone)

22 Rachael Glenister
23 Arnold Eilert
24
25

P R O C E E D I N G S

(The following proceedings were held in open court before the Honorable Margaret R. Guzman, United States District Judge, United States District Court, District of Massachusetts, at the Donohue Federal Building & United States Courthouse, 595 Main Street, Worcester, Massachusetts, on February 28, 2024.)

THE CLERK: All rise.

Court is now open. You may be seated.

THE COURT: All right. Good morning, everyone.

COUNSEL IN UNISON: Good morning, your Honor.

THE CLERK: Case Number 21-10572, KPM Analytics North America Corporation versus Blue Sun Scientific.

Counsel, please note your appearance for the record.

MR. GUTKOSKI: Good morning, your Honor. John Gutkoski on behalf of KPM. With me is my colleagues Kevin Mosier and Jacqueline Salwa, cocounsel Scott McGee, and Paige Zacharakis, and with us this morning on behalf of KPM is its chief commercial officer, Mr. Yuegang Zhao.

THE COURT: All right. Good morning, all of you.

MR. ZHAO: Good morning.

MR. WILSON: Good morning, your Honor. Dallin Wilson on behalf of the individual Defendants Arnold Eilert, Rachael Glenister, Robert Gajewski, and Irvin Lucas. And Mr. Lukas and Mr. Gajewski are present today in the courtroom; and

1 Ms. Glenister and Mr. Eilert, as I understand, are on the
2 telephone.

3 THE COURT: Thank you.

4 MR. RITCHIE: And good morning, your Honor. George
5 Ritchie on behalf of Blue Scientific and Innovative Technology
6 Group.

7 Mr. Lucas is here in the courtroom from Blue Sun; and
8 Mr. Robert Wilt is here for ITG.

9 THE COURT: All right. Thank you, all. It's good to
10 see you all again.

11 We have been busy, since we finished our business
12 here, and we -- I have had to refamiliarize myself with -- with
13 our case, and I have familiarized myself with the filings.

14 So let me -- I'd like to, if we could, start with
15 KPM's argument regarding its most recent filing, because --
16 regarding the additional violations alleged of the preliminary
17 injunction.

18 And are we prepared to do that?

19 MR. GUTKOSKI: Sure.

20 THE COURT: Okay.

21 MR. GUTKOSKI: I believe our hearing on all the
22 post-trial motions was in October. At the beginning of
23 November, KPM became aware through communications with its
24 customer, Omega Protein, one of the customers that was featured
25 during the trial, of additional violations of the preliminary

1 injunction order.

2 Confronted with that new information and with briefing
3 being closed, we had the option, as we saw it, either filing a
4 motion for contempt, which seemed to just be seeking additional
5 fines or -- or penalties on top of everything the jury had
6 already ordered and everything that we had submitted in the
7 post-trial motions, which we thought would cause potentially
8 additional delay of the Court entering final judgment; or
9 instead, the track that we chose, which was to submit this new
10 information to the Court for its consideration and thought it
11 most relevant to the motions for a permanent injunction and for
12 multiple damages under 93A, and that is the option that we
13 chose and the motion that we have before us today.

14 The evidence as set forth in the moving papers is that
15 in April of 2023, two months before trial, Blue Sun was
16 approached to provide preventive maintenance for Omega Protein.

17 Omega Protein, as was established at trial, is a
18 customer that Mr. Gajewski, in conjunction with his wife, who
19 is then working at KPM, and Mr. Lucas, diverted to Blue Sun.
20 This is at trial Exhibits 112 through 114 and related testimony
21 as cited in our papers.

22 This was the customer that Mrs. Gajewski received the
23 inquiry to provide preventive maintenance for in 2019.
24 Mrs. Gajewski quoted them a price. That price was then
25 communicated to Mr. Gajewski and by Mr. Gajewski to Mr. Lucas.

1 Blue Sun then undercut that price with that trade secret
2 confidential information in order to secure the preventive
3 maintenance business for Blue Sun. And Mr. Gajewski did go and
4 perform the preventive maintenance for Omega Protein in 2019,
5 and Blue Sun charged that reduced price for, I believe, the
6 record shows five different units at three different locations.

7 The evidence at trial also established that they
8 continued that relationship and performed preventive
9 maintenance in 2020, 2021, and 2022.

10 As the Court knows, in 2021 the Court issued a
11 preliminary injunction, which in part prohibited the individual
12 defendants and Blue Sun for performing any preventive
13 maintenance services on KPM SpectraStar units at any of KPM's
14 customers with which the -- any of the defendants had had prior
15 contact.

16 The evidence that came to light in November of last
17 year was that KPM -- was that Omega Protein reached out
18 to -- reached out to the defendants seeking preventive
19 maintenance for 2023, and that it was performed in April of
20 2023, as it had been in the previous years, but this time was
21 done by a company called Caltest.

22 Caltest was touched on briefly in the trial record,
23 because as our papers show in discovery, Caltest was revealed
24 to be a company that Blue Sun had acquired. And we asked
25 Mr. Lucas, as the 30(b)(6) designee of Blue Sun what, if any,

1 involvement Caltest had in servicing KPM machines. As you see
2 in the deposition testimony, he testified that they had no
3 involvement; that if a customer called or reached out to Blue
4 Sun or the defendants in order to obtain preventive maintenance
5 that would be performed by Mr. Gajewski or Mr. Eilert or one of
6 the other former KPM employees by Blue Sun. It would not be
7 done by Caltest. That Caltest had only one employee, and he
8 was only involved in writing calibrations for FOSS machines,
9 one of the other competitors.

10 Despite that fact, Omega Protein in the November time
11 frame last year told KPM that it had received preventive
12 maintenance on its five SpectraStar units from Caltest. The
13 website information for Caltest confirms that it shares an
14 address, the corporate address of Blue Sun and ITG in Maryland.
15 And the Caltest president is Irvin Lucas.

16 These -- these are all the points that we've set forth
17 in our papers. We believe that the Court should consider this
18 because it only became -- we only became aware of it after
19 trial and after briefing.

20 As the Court will recall from testimony at trial, many
21 of the records and emails from the defendants were deleted and
22 destroyed, and as a result all of the -- most of the evidence
23 that is available to KPM regarding the defendants' actions
24 comes to us second or third hand by customers; and in this
25 case, that is what happened. After the briefing was completed,

1 this information came to us.

2 In opposition to the motion asking the Court to
3 consider this new information and this latest violation, most
4 notably the defendants do not say that they did not do it.
5 Nowhere in their papers do they say that they did not provide
6 preventive maintenance for Omega Protein in April of 2023, nor
7 do they say they did not try to obscure doing so by doing this
8 through the Caltest entity rather than themselves, and nowhere
9 do they say that they did not violate the preliminary
10 injunction and its restriction on the individual defendants and
11 Blue Sun from doing so.

12 They instead raise a series of procedural arguments
13 saying that we should be here in a contempt proceeding. Again,
14 that was an option available to us, and in theory still is, but
15 we think it most relevant that the Court consider this in
16 wrapping up its decisions on the post-trial motions and
17 entering final judgment.

18 The preliminary injunction was clear. It had two
19 fundamental restrictions. One, none of you can sell any of
20 your own analyzers to any of the customers that the individual
21 defendants previously dealt with.

22 And in our post-trial papers, in our post-trial
23 motions, we were able to uncover two situations, one with R&R
24 Machine and one with Idahoan where they violated that
25 provision.

1 The other restriction, significant restriction in the
2 preliminary injunction, was not to provide individual -- the
3 individual defendants and Blue Sun were not to provide any
4 preventive maintenance services on this service-to-sale model
5 that these parties operate under, were not to provide any
6 services on SpectraStar machines to any of those customers, and
7 now we have evidence regarding Omega Protein of them violating
8 that.

9 These actions, we believe, are directly relevant to
10 the Court's entry of a permanent injunction and to the
11 inappropriate, unfair and deceptive trade practices practiced
12 by the defendants, and we can ask the Court to grant the relief
13 that we've asked for under 93A and in regard to equitable
14 relief of a permanent injunction as set forth in our papers,
15 not only for the reasons set forth in those papers and argued
16 back in October, but based on this new information.

17 THE COURT: All right. Thank you.

18 All right. Attorney Wilson.

19 MR. WILSON: Good morning, your Honor.

20 Very briefly, I think Attorney Gutkoski -- I
21 appreciate his candor recognizes that there were what he says
22 two -- two ways they could have done this. One was pursuing a
23 contempt proceeding, and one was to file what was a motion to
24 file a supplementary brief that attached an affidavit that I
25 think we all admit is inadmissible. It's double hearsay. It's

1 Mr. Zhao says that another employee of KPM told him that
2 somebody from Omega Protein told him that this had happened.
3 We think that not only is it a matter of procedural improper,
4 it's a due process issue.

5 Effectively, what they're saying is you need to come
6 out and deny this admissible evidence that never would have
7 come in at trial. Mr. Zhao wasn't a witness. And had they
8 tried to bring in testimony this way, I presume it would not
9 have been allowed at trial. So, effectively, they're trying to
10 get around what would have prevented this evidence of coming in
11 at trial and saying, well, you should consider this on a motion
12 to file a supplementary brief. We've opposed it. We think
13 there are serious due process concerns about your Honor
14 considering evidence that didn't come in at trial and cannot
15 come in the way that they've tried to put it in.

16 THE COURT: For any purpose whatsoever?

17 MR. WILSON: For any -- it's -- it's clearly being
18 offered for the truth of the matter asserted, right.

19 THE COURT: Uh-huh.

20 MR. WILSON: I mean, it is hearsay. I'm not aware of
21 any exception to hearsay that would allow the Court to consider
22 this.

23 THE COURT: Do you want a hearing in which you can
24 refute it? Do you want -- do you want to put on witnesses that
25 will refute that?

1 MR. WILSON: We don't, your Honor, and we don't think
2 we should be put in a position, particularly in this procedural
3 setting, a motion to file a supplementary brief to show up and
4 say, okay, now we're going to put on evidence to refute -- to
5 refute evidence that would not have come in at trial. It could
6 not have come in. And I don't think there's any way for your
7 Honor to consider it at this stage in these proceedings.

8 The last thing I would say is an argument that KPM
9 repeatedly makes is that somehow a violation of a preliminary
10 injunction should somehow be considered by the Court in
11 structuring a permanent injunction. And -- and we
12 fundamentally disagree with that. An injunction is not a
13 punitive thing. It cannot be a punitive thing. And the way
14 that they're treating this is we should punish these folks for
15 violating the preliminary injunction by ordering a more
16 stringent or more burdensome permanent injunction. And that
17 simply is not the law. It cannot be punitive. And so I'm not
18 sure that this has any relevance whatsoever to the motions that
19 are pending before your Honor; and even if they are, again,
20 there's -- there has been no admissible evidence put before
21 your Honor to consider, and for that reason we would ask that
22 the motion be denied.

23 THE COURT: All right. Thank you.

24 MR. RITCHIE: Your Honor, I adopt Mr. Wilson's
25 comments.

1 The only thing I would add is there's no evidence
2 before the Court that ITG had anything to do with this
3 particular servicing or is aware of it. And that's all I have
4 to add.

5 Thank you.

6 MR. GUTKOSKI: Your Honor, if I could just say by way
7 of reply. Mr. Lucas is here. I'm happy to have him take the
8 stand, and I'm happy to ask him exactly what he did, be it for
9 Blue Sun or Caltest or both in April of 2023.

10 THE COURT: All right. Well, let me -- let me just
11 tell you what I think is relevant and in the -- to the case
12 before us, and the stage we're at right now and the -- you
13 know, what -- what this new information, what its relevance is
14 to -- to the determinations that I have to make.

15 The -- the trial was long and well fought, and the
16 jury was clear in very -- many respects.

17 The -- the preliminary injunction is also very clear.
18 Judge Hillman -- it was including the updated preliminary
19 injunction on December 17th, 2021. It was very specific about
20 what it was intended to do.

21 I did not create this preliminary injunction, but
22 based on what I heard at the trial and my awareness of all of
23 the -- and familiarity with the filings through the -- I became
24 familiar with the case, you know, through all the multiple
25 filings, that Judge Hillman was clear, very clear, really very

1 specific, and it was -- it was written in a way that was
2 speaking to what I believe he found to be significant
3 allegations of particularized behavior, which then now from
4 where we are the jury agreed with. The jury found for the most
5 part that there was a substantial and sufficient standard that
6 was met in the determination of what happened between the
7 employees of KPM, the entities known as ITG and Blue Sun, and
8 they -- we -- we saw -- we saw multiple witnesses talking about
9 that.

10 So the preliminary injunction, when you look at it
11 from December 17, 2021, was in my mind firmly supported by the
12 evidence that was found by a jury, overwhelmingly found. They
13 were unanimous in their determination of what the facts were,
14 which supported many of the charges, and we have their verdicts
15 here.

16 And specifically, the ones I think that are the most
17 relevant are their -- the unfair and deceptive trade practices
18 and the trade secrets misappropriations. Both of those types
19 of claims were determined by the jury to be supported by the
20 actions that they -- that they heard about in the evidence.

21 The preliminary injunction was intended -- and it's an
22 unusual remedy prior to trial. We generally don't punish
23 people until a jury or a judge has made a legal determination
24 that the behavior that's claimed is, in fact, supported by
25 evidence. But in this -- where we are right now, we're not in

1 that same position. A jury heard weeks of evidence, mountains
2 of evidence, and worked through a determination that the
3 evidence that had been presented established that information
4 product and trade-protected information was being taken without
5 permission, without paying for it from the entity of KPM's --
6 within KPM's world, and it was taken and it was used and it was
7 used in a way that benefitted financially the people that were
8 using it. And Judge Hillman said don't -- don't do it anymore.
9 We haven't found you responsible, but there's enough evidence
10 to suggest that if you are, don't do it anymore. And that was
11 basically what the preliminary injunction said. That was my
12 understanding of it.

13 And it was very specific. If you got this information
14 while you were employed there, it was KPM's, not yours. And if
15 you -- and it was very specific in the things that they
16 shouldn't be doing, reaching out to customers and -- and doing
17 things, very specific things.

18 It wasn't -- it isn't -- you know, trade secrets can
19 be overwhelming if that's not your field. In the infrared
20 spectrometer information, that was really overwhelming for a
21 nonscience person, but I thought it was very well described in
22 our trial, and I had a little clinic on that myself, and the
23 jury understood, but the people in that field know that it
24 takes a lot of time and money and investment to create that
25 type of technology. It takes years and decades to build a

1 customer base that supports you and provides financial benefit
2 from the relationship. And what we learned in the trial is
3 that very easily and very quickly someone who has a desire to
4 take shortcuts can do that. They tricked clients into thinking
5 that they were still working with KPM. They outright made
6 falsehoods regarding their ability to propose that they do
7 their work with a different entity, and that was determined by
8 a jury.

9 The preliminary injunction is unusual, especially in
10 the world that I'm used to, because it really is -- it's like a
11 prejury judgment, but in this case at trial, it was thwarted,
12 the evidence was that what was told they shouldn't do had been
13 supported by a jury found that that -- the evidence that was
14 presented supported the allegations that they had, in fact,
15 misbehaved in this way and -- and that that was what their
16 verdict said very loudly.

17 And an allegation that after our jury had made this
18 determination that same behavior continued, it is contemptuous
19 if you find that it has been -- and I agree, that this could
20 actually be an action for contempt, but that's not what is
21 before the Court.

22 MR. WILSON: Can I just clarify one thing, your Honor?

23 THE COURT: Yes.

24 MR. WILSON: I believe the allegation here was that
25 the service was done here before trial, and it was learned

1 about later. I'm not suggesting that's a big -- changes your
2 analysis at all, but I just wanted to make sure the record was
3 clear that the allegation here is the service was performed
4 prior to trial, not after.

5 THE COURT: But it was not performed prior to when the
6 preliminary injunction was issued.

7 MR. WILSON: I understand.

8 THE COURT: That's -- of course the secrets don't
9 always come out when it's convenient, because had we known
10 that, right, you know, I don't know if that evidence would have
11 gone, but I'm being asked to determine whether or not -- so the
12 jury has made a recommendation that a 93A should be supported.
13 All right. And I have to -- I take that recommendation, but I
14 have to make my own independent analysis, and I have to
15 determine if yes, you know, the significance of double and
16 tripling damages is not lost on me. This is -- we're talking
17 about big numbers here. But December 17, 2021, was enough
18 notice to the players to stop it. Stop it. They took the
19 risk, if this is determined to have been supported by evidence,
20 they took the risk at -- at what I now have to make a
21 determination. I have to struggle with under the 93A
22 consideration whether or not I should support it. Was the
23 behavior willful and malicious? I have to determine that. I
24 can't say that, you know, we -- in our district the -- the
25 First Circuit, we don't have -- there's not a -- there is not a

1 seminal case on the determination about what is the standard.
2 I mean, I know -- you know, it's kind of like, you know, I
3 can't describe it, but I know it when I see it, but in this
4 case, we have two different cases that have come out with
5 different -- on different fact patterns, and they have
6 established, you know, sort of, you know, two different
7 determinations of what would be -- what would support the -- a
8 93A.

9 Well, willful and malicious is one of those. And if
10 you're told in December of 2021 to not do something, the -- the
11 fact that in November of 2023 or February of 2024 there's an
12 allegation that after December 2021 you did some of the
13 things -- there's just an allegation about it, you did some of
14 the things that were -- you were told not to do, I think
15 that -- that answers the question about is that willful and
16 malicious.

17 Willful means you're doing it knowing that you
18 shouldn't be; and malicious is for an intention that is not for
19 the purpose -- the person who is protected by the injunction.
20 That's -- so the problem is not I don't consider this as a
21 contempt. It's not alleged as a contempt. It's not alleged as
22 a new offense. That has to be -- that's a separate trial. I'm
23 not -- I am not treating this as something that I should be
24 punishing them and attaching money to it for this particular
25 allegation.

1 If they want to pursue that, they have to file. They
2 have to file a suit against it, and then a jury or a judge has
3 to make a determination, if the evidence warrants a finding.
4 But that's not the standard to determine whether or not there's
5 evidence that without a permanent nature of this preliminary
6 injunction the beat's just going to keep going on.

7 And it was pretty clear in the evidence that, you
8 know, shaming and reminding and, you know -- you know, sending
9 letters to stop or -- that's not -- that has no -- there's some
10 incentive of continuing this behavior on the part of some of
11 the players in this case that -- that is -- doesn't have an
12 effect on them. They just ignored it. And the fact that
13 there's an allegation that very, very similar behavior, going
14 through the service contract, you know, make your way in that
15 way, that was -- that was repeated over and over and over
16 again. And unless there's some, you know, some significant
17 refuting of the allegations of that, it is relevant to my
18 determination as to whether or not the players who were
19 determined to have taken those shortcuts, whether or not they
20 will continue to do it, and what -- how do we protect the
21 plaintiff that has met its case, that -- that's what's here
22 today. And that's not about contempt. That's about, you know,
23 Judge Hillman didn't say, you know, and I hope you'll abide by
24 this. I mean he signed it as a U.S. district judge with all of
25 the power that that comes with it. And that is at least

1 allegedly didn't stop them.

2 So I -- as far as whether or not they should file a
3 request for contempt, I don't think it's contempt. It just is
4 intended to show me whether or not any -- a preliminary
5 injunction that expires will not have any harm to KPM or
6 whether or not they need to permanently, with the confines of
7 the information that they earned, they own, should be protected
8 for a period of time, and I think that -- I think it's
9 extremely relevant to that.

10 Attorney Ritchie.

11 MR. RITCHIE: Your Honor, maybe -- maybe I spoke too
12 briefly, but I'll try to flesh out what I was trying to convey
13 before, which is that this particular allegation -- I
14 understand the Court's view and the jury's view of what
15 happened last May, but this particular allegation sheds no
16 light on the behavior of ITG for purposes of the determinations
17 your Honor has identified, the 93A claim and the permanent
18 injunction claim.

19 With respect to the permanent injunction claim, your
20 Honor, recall that the testimony was that ITG had a stand-alone
21 independent business as a manufacturer and seller of these
22 machines; and, in fact, they had designed the very machine, the
23 first machines that KPM sold. This is Mr. Wilt was the
24 progenitor, if you will, of this particular style of machine
25 and this business, and nothing about this particular incident

1 sheds any light on whether or not ITG should be allowed to
2 manufacture and sell, perhaps not through Blue Sun, but on its
3 own machines that it always manufactured and sold. There is
4 nothing linking this particular incident to anything that
5 relates to the ITG manufacturing and to its own independent
6 business line.

7 One could question and -- and wonder about the why ITG
8 is associated here in this courtroom with some of the other
9 defendants, you know, that's -- you know, I'm sure those
10 questions have lingered in the jury's mind and in the Court's
11 mind. But with respect to ITG, the fact that Blue Sun and this
12 other party Caltest did one servicing, you know, allegedly
13 during a time when the injunction was applied doesn't -- has
14 nothing to do with ITG manufacturing and selling its own
15 machine. So that's part one.

16 And then part two, on the 93A claim, your Honor said
17 willful and malicious, which meanings intentional, right, and
18 that you were doing it to hurt somebody. There's nothing that
19 links this alleged servicing to anything that ITG made, and
20 there's no inference the Court can make that ITG did something
21 willful to allow the servicing to happen or that ITG did
22 something malicious to hurt KPM in the servicing of this
23 machine.

24 So when I jumped up and spoke very briefly, I should
25 have been clearer, but I wanted to get that on the record and

1 explain this to your Honor because I --

2 THE COURT: Even -- listen, even if you -- you know,
3 you went back to your office and you called and you said, you
4 know, but I just had a thought. I -- I understand that. I
5 really do. And I -- again, the preliminary injunction is
6 intended to protect what KPM has that a jury has found that
7 they have or what we -- anybody could agree that they have from
8 unfair acts by the defendants.

9 The -- and the preliminary injunction mostly was going
10 to, in my mind, from what I read, people who did not -- people
11 who had access to this information under protected
12 circumstances through their employment contracts, you know,
13 they could -- if they had broke in and they went into the
14 computer, they'd be criminals for having broken in and taking
15 something.

16 The -- the admonition against using any information
17 that they gained there outside of there, that's like as if they
18 were breaking in. So this is the -- and I think that we should
19 be able to fashion the injunction in ways that protects your
20 client. I agree he does -- ITG does not stand in the same
21 places especially related to this particular allegation as Blue
22 Sun does. And so I agree with that.

23 MR. RITCHIE: Okay.

24 THE COURT: But I don't agree that -- that -- that
25 there is some -- that a jury needs to hear about this.

1 Now, if this were just wholly out of -- you know,
2 if -- if Blue Sun and the allegations on this and the chance
3 that it might have a permanent -- and create a permanent
4 injunction wanted to challenge that, we could have a hearing.
5 We could put on evidence, and it would only be solely related
6 to whether or not this -- there was probable cause to believe
7 or some standard that this actually happened. Maybe it is out
8 of cloth, maybe it's not true, and that could be refuted, but
9 if it's not refuted, the allegation is informing my
10 determination on whether or not to make this a permanent
11 injunction.

12 But it -- it needs to inform the way I handle ITG
13 regarding a permanent injunction as well, and that is where you
14 don't need to stand up. I will hear you on that. I -- so the
15 first line that I have to -- I want to be sure everyone's clear
16 about, I'm not treating this as a contempt. It's contemptuous
17 if it happened, it really is, but I'm treating this as
18 information whether -- because there was a motion for me to
19 make this a permanent injunction. So I find this information
20 unrefuted provides KPM and provides the Court with the
21 assurance that a permanent injunction may very well be the only
22 way to protect KPM because -- because there were -- there was
23 an allegation that all of the stuff that was taken, the
24 computer disks and all those databases were destroyed, were no
25 longer available, that's an allegation, because I do not think

1 that a jury found that that information does not exist. I
2 think there's -- it may be somewhere. It may have been
3 prevented from being brought to the Court. It may have been
4 not shared, but there is a continuing danger for KPM through
5 its own clients that it cultivated and developed long-term
6 relationships with that had a financial benefit to them that is
7 not -- is being unfairly used so -- by someone else.

8 So it goes to the nature of the injunction, whether
9 it's prelim- -- whether it should be permanent or not. But it
10 does also go to whether or not the behavior -- you know, the
11 jury made a determination. They were -- I guess 93A is kind of
12 like does it offend you what they did in the sense of the law.
13 And I think the jury was really offended, but I still have to
14 make a determination whether or not I'm going to determine that
15 93A violations have been met and then to determine what to do
16 about that.

17 This information is relevant to that. It's relevant
18 in that, you know, the actions of the employees may have just
19 been greed. Maybe it's just greedy. Maybe they just -- maybe
20 just lazy. Maybe they just wanted to take what somebody else
21 had and -- and use it and make the money and not have to do the
22 work, invest the intellect, the resources. Maybe that's what
23 they did. But then when they were told to stop doing it, and
24 they kept doing it, that says it was more than just greedy. It
25 was in your face. And so I -- that is why it's important.

1 And I would like counsel, Attorney Gutkoski, to talk
2 about ITG's, you know, what impact a permanent injunction
3 should have on ITG, because I think that's -- I think that is a
4 relevant issue.

5 MR. RITCHIE: Well, I think that the permanent
6 injunction that KPM is asking for would effectively stop ITG
7 from selling its machines.

8 ITG created the market. All the customers that
9 Mr. Olson described were legacy customers from ITG back when it
10 was Unity Scientific, which was the business that KPM purchased
11 from Mr. Wilt and his partner. And all those customers
12 Mr. Wilt testified were people -- customers they sold machines
13 to.

14 Now, that alone isn't enough, and I -- I understand
15 the position the Court is in, but I would offer this. The jury
16 did find -- I mean, I -- I know the Court wants to give credit
17 for all the jury findings, and I understand that.

18 THE COURT: No, it's respect. It's not credit. I
19 have to respect --

20 MR. RITCHIE: Well, okay, I think that's a better
21 word. The respect should also be given to the jury finding
22 that ITG didn't take -- didn't misappropriate KPM's trade
23 secrets, which when you couple that with the evidence means
24 that ITG stand-alone created its own machines on its own
25 technology and sold that technology without regard to the KPM

1 trade secrets.

2 I understand there's this issue about servicing and,
3 you know, that it's a complicated thing. But give the jury
4 respect, it means something. That finding means something just
5 like the other jury findings mean something.

6 And I think that the Court could fashion an
7 injunction, if it were so inclined. I don't think there should
8 be a permanent injunction, but if there were one to be issued,
9 the Court could fashion one that would allow ITG to sell its
10 machines in the same market it sold prior to Blue Sun, prior to
11 this court case, prior to the jury finding, because I think
12 what the jury was signalling was yes, we accept Mr. Wilt's
13 testimony.

14 THE COURT: Well -- well, if Mr. Wilt approaches or
15 ITG approaches a -- a potential client, and that potential
16 client, he didn't get that information from the client base
17 that they already have, then it's just competition. This is
18 the -- the injunction is about taking information, client
19 contacts names, what they were serviced for, what machines they
20 have. That's what happened here. That was taken, and then
21 they were contacted.

22 MR. RITCHIE: Well, but I think the testimony was
23 clear -- Mr. Wilt said all these customers -- remember
24 Mr. Olson was on the stand, and counsel showed him a piece of
25 paper, and we went through this rigamarole of could he remember

1 the names written down on the piece of paper, and actually he
2 couldn't. No offense to Mr. Olson. It's a big company, and I
3 get it.

4 Mr. Wilt named all of his customers at Unity
5 Scientific when it was a start-up company, and those are the
6 same customers. So whether, you know, Disney or I'm trying to
7 think of some of the names of these companies now, and I
8 apologize. All those names, all those customers were in
9 Mr. Wilt's head and in his database before Blue Sun, before
10 Unity Scientific was sold to KPM. All that existed so I think
11 that if there were an injunction issued that was clear about
12 issues relating to servicing and issues making clear that
13 there's no technology that -- that -- remember there was the
14 whole question of the software, your Honor, and whether or not
15 that was a trade secret and whether or not that had been
16 misappropriated, and the jury found that the individual
17 defendants in Blue Sun had misappropriated that software, but
18 they did not find that with respect to ITG.

19 So an injunction that incorporated those jury findings
20 would have exempted ITG to sell its own technology to customers
21 it had previously sold to, I think that's a fair argument,
22 because I think that respects the very fine balance that the
23 jury engaged in in this case. And I give the jury credit for
24 sifting through a lot of evidence.

25 THE COURT: But they did find that -- I mean, they

1 made a recommendation regarding the 93A to both, to ITG and
2 Blue Sun. So I'm -- you know, it isn't that they were saying,
3 geez, I don't know why that guy is here. That isn't -- that
4 wasn't the case.

5 But I -- and I also -- I'm going to hear from the
6 plaintiffs, but I mean didn't Mr. -- I mean, it's my
7 understanding that Mr. Wilt got something for what KPM made its
8 business on. Mr. Wilt bargained in some way at some point;
9 otherwise, he'd be claiming that someone stole his invention
10 and his customer base, right?

11 So he -- I think -- I mean, I don't know quite -- I
12 don't know quite what it is that you're referring to as far as
13 he -- yeah, he created those things. He was showing us what
14 the -- the machine and everything, but he -- you know, so I'm
15 not quite sure where it is that you're going with this, why --

16 MR. RITCHIE: Well, I think what I wanted to -- I'm
17 not sure if I'm going to answer the Court's question, but I had
18 a thought, which is that you're right, the jury didn't make the
19 recommendation on the 93A with respect to ITG. And if you go
20 back and look at the verdict sheet, the jury found that ITG
21 interfered with the contracts. That was the tortious
22 interference with contracts, which in this case was the
23 employment contracts, I think. I mean, KPM didn't make that
24 very clear to the jury; and, in fact, the jury asked that
25 question. But it seems clear they were concerned about the

1 servicing aspect that was going on with Mr. Gajewski and
2 Mr. Lucas and the others. And if you -- they clearly drew a --
3 they drew a distinction between what was happening on the
4 employment side of Blue Sun and what was happening on the trade
5 secret side at ITG.

6 And so that's where I'm going with this, your Honor.
7 If an injunction issues, one ought to issue that allows ITG to
8 engage in the manufacture and sale of the machines that it has
9 always manufactured and sold without regard to Blue Sun or
10 anything else because none -- nothing that the jury found
11 indicates that the jury thought that ITG uses KPM trade secrets
12 with respect to the manufacture and sale of its machines, which
13 is the ITG business, and that was the jury's finding, no trade
14 secret misappropriation. So that's the point that I'm
15 hopefully trying to make to the Court.

16 THE COURT: Well, they did -- they did issue a
17 1.8 million judgment regarding tortious interference --

18 MR. RITCHIE: And that's right.

19 THE COURT: -- and but for ITG there is no Blue Sun.
20 And that was -- that was very clear.

21 MR. RITCHIE: And those are the damages, and that's
22 the --

23 THE COURT: Yeah.

24 MR. RITCHIE: -- harm that the jury is compensating
25 KPM for with respect to the employment-based service issues

1 that the jury was clearly concerned about.

2 But going forward, going forward, not past damages,
3 going forward and -- and -- and -- and, you know, you have this
4 pre -- you have Unity Scientific pre KPM when you have the
5 situation today, and there's nothing that shouldn't allow the
6 Court to take ITG back to the pre KPM/Unity Scientific model
7 where it's selling its machines without regard to Blue Sun.

8 THE COURT: Well, I'm never going to do that. I may
9 not prevent it, but I -- I can't even -- I'm never going to
10 have any role in them doing what they're going to do.

11 So let me hear from -- let me hear from KPM
12 regarding -- and I do agree that they do stand in a different
13 place, but, you know, whether there are corporate documents
14 that link them now or not, they're -- they're tied together.
15 There's -- there's no doubt that there's -- you know, this is
16 not -- it's not two people that run into each other for the
17 first time in the elevator on the way to the trial.

18 So let me hear from counsel.

19 MR. GUTKOSKI: The Court's correct, the jury was
20 offended. This conduct is atrocious, and the jury spoke loud
21 and clear in terms of who it held accountable for that
22 atrocious behavior with its verdict, which included, as your
23 Honor just noted, the largest damages award against ITG and,
24 therefore, its owner Mr. Wilt.

25 We heard extensive testimony that Wilt is the sole

1 owner of ITG, and ITG is the sole owner of Blue Sun. The
2 revenues for Blue Sun, that Blue Sun earned flowed up to ITG.
3 The jury heard all that. They understood who was the ultimate
4 beneficiary of this, and they rejected Mr. Wilt's repeated
5 attempts to say I didn't know what was going on. I -- I -- I
6 turned a blind eye to that. It was all Lucas, he -- he did all
7 of this.

8 Well, your Honor is correct that the preliminary
9 injunction in December 17th -- in -- in August of '21 and then
10 renewed in December of '21, after the defendants challenged it
11 was clear, was clear notice to the individual defendants and
12 Mr. Lucas to stop, but it was also notice to Mr. Wilt and ITG,
13 you should be looking in on this. You should be making sure
14 this isn't happening.

15 Part of that injunction went to ITG. We heard no
16 evidence, and there's nothing in the record to say that once he
17 was put on notice that Mr. Wilt and ITG did anything to change
18 Mr. Lucas' actions, to reign in him and Mr. Gajewski. The
19 evidence that has come to light afterwards indicates that he
20 did nothing more, that they continued doing, that they will not
21 stop, as your Honor has noted.

22 The two corporate defendants do stand in -- based on
23 the record, do stand in different positions, overlapping. It's
24 a Venn diagram. Significant overlap, but separate. And Judge
25 Hillman already addressed that.

1 In ECF 120, the preliminary injunction, as revised in
2 December of '21, specifically set forth a restriction on
3 providing any services or products in paragraph 5. And it
4 restricted those activities as to the individual defendants and
5 Blue Sun.

6 In paragraph 6, it restricted all defendants,
7 including ITG, from selling any of their analyzer products to
8 any of the customers that the defendants previously had any
9 connection with at KPM.

10 Some of these customers do date back to the early
11 foundings of Unity, which Mr. Wilt founded and sold; sold that
12 business, sold the rights to it, sold the technology, sold the
13 customers and the relationships and the trade secrets. He has
14 no right to use those anymore.

15 And Judge Hillman said, if you look at ECF 93, his
16 order explaining the initial preliminary injunction ECF 94, he
17 says he has got -- he, ITG, has this separate business, so I'm
18 going to address that distinction by setting forth these
19 different restrictions in five and six.

20 The restriction on ITG is as to selling to our KPM's
21 customers any analyzer. He has already solved this problem.
22 Judge Hillman has already solved this problem for us. In our
23 proposed permanent injunction, ECF 277-1, KPM simply asked the
24 Court to continue this exact same solution. We ask in
25 paragraph 5 that the individual defendants and Blue Sun are

1 prohibited from selling and offering to sell services and
2 products.

3 ITG can -- can sell its additional consumables and
4 products and -- and -- and things that it has always sold for
5 the use of any customer. The restriction on ITG is as to sales
6 in paragraph 6 in our proposed permanent injunction, and it
7 continues Judge Hillman's same restriction.

8 In terms of selling new analyzers, we're not asking to
9 bar him from the analyzer market. We're not asking to bar him
10 and ITG from competition, if there -- all the other rest of the
11 customers in the world who can use near infrared analyzers, he
12 is free to sell to, except those customers that any one of the
13 defendants, him or Lucas or Gajewski or Glenister or Eilert,
14 anyone who has gone from KPM to Blue Sun, any customers that
15 they had previous contact with, that the jury was so offended
16 that they were manipulating and lying to and confusing as the
17 Court has noted here this morning, those are off limits.

18 He can compete with the rest of the -- the rest of the
19 marketplace and the rest of the world. Just stay away from our
20 customers, stay away from those that have been -- that your
21 access to, your knowledge of has been tainted by the
22 reprehensible acts of your employees who used to be our
23 employee, that so offended the jury.

24 THE COURT: Well, how do we -- but how do we prevent
25 it from being overreach?

1 So there are, you know, if -- if the information -- if
2 the contact that Mr. Wilt has with someone is not tainted by
3 that, how do we -- how do we -- we want him to be able to -- to
4 sell the product that he's created but without the -- the
5 offensive behavior was literally taking the service
6 relationships, using them as the door to get in to selling them
7 product and services.

8 I also want to just address the issue of, you know,
9 there's a period of time at which all of this becomes, you
10 know, you don't want anything to be in perpetuity. You
11 want -- there was a period of time when this needs to address
12 the needs that KPM has, but also does not stifle competition
13 and other things that we really do value. So these are other
14 issues that I struggle with as far as the length of time and
15 the wording.

16 So the -- I do think that -- I mean, how is it, and
17 counsel, I'm just wondering, how is it that -- this is my
18 concern. I don't have -- this is not intended to be
19 punishment. This is intended to be protection based on the way
20 the jury -- the way the claims were presented and what was
21 really established at trial so that they're not unfair.

22 And do you think that there's something about the
23 wording that we can do that might address that particular
24 issue?

25 MR. RITCHIE: I'm going to say two things with the

1 risk of possibly coming back here to Worcester.

2 THE COURT: We can do it by Zoom.

3 MR. RITCHIE: I wasn't prepared to do this.

4 THE COURT: No, and I -- we can do this -- we don't
5 have to do this in person. We can do this by Zoom, not that
6 Worcester is a wonderful place to visit, but it is -- I want to
7 get this correct, right. There's no doubt in my mind that a
8 permanent injunction is necessary because I really -- I -- I
9 think that, you know, what was discovered in that instance is
10 just not the only thing that what might come up so just because
11 that is pretty clear that that was -- that that was a standard
12 course of behavior, and I don't -- you know, people don't
13 generally change, so. But I take very serious the -- the
14 issues that you raise on behalf of ITG, and I think that when
15 we're going forward, I think there's no doubt in my mind that a
16 permanent injunction is necessary, but an -- an appropriate
17 discussion -- and the -- the Blue Sun and all those individual
18 defendants, we can very easily tell them what not to do, very
19 specifically. Whether they follow it or not is really
20 something for future court dates, but I want ITG to be treated
21 appropriately, and I would like the two parties to talk about
22 potential offering of potential language that I could consider
23 as an amendment or we can have a hearing on Zoom in which we
24 can argue, and then I will make a decision if we can't come to
25 an agreement. And that's not -- that's no in any pejorative.

1 You can or cannot. I mean, and maybe you can come to some
2 specific language especially because of that specific, but this
3 also would mean that there has -- there's going to have
4 to -- if there is a difference between ITG and Blue Sun and
5 treatment in the permanent, there has got to be a Chinese wall
6 that is built because -- because, you know, we can't use one
7 and have -- and have it be -- have it be perverted by the other
8 players who very well could, and I think that they still have
9 an incentive to do it, so.

10 MR. RITCHIE: Could I make a suggestion, your Honor?

11 THE COURT: Sure.

12 MR. RITCHIE: I -- to give the parties a reasonable
13 amount of time to have these discussions, and then we could
14 report back to the Court whether there is agreement, whether we
15 have a need to have a further hearing on that point.

16 THE COURT: Absolutely. Absolutely. And I'm
17 not -- we're -- we're not dealing with the other motions right
18 now. We're -- this is really -- this was really important, I
19 think, to have this one, but these are motions that I have
20 to -- we're going to be making sure we have our rulings before
21 the end of March, but if you -- we're available at any time.
22 I'm going to take this particular -- the language of it under
23 advisement.

24 Please note, you can let your clients know that I
25 intend that they will receive protection. Some of the specific

1 language between ITG will not yet be determined. I want you
2 all to talk about it. We can have a Zoom hearing to -- to
3 debate it, but we'll -- let's do this on a -- let's keep this
4 on within the next couple of weeks. We have some form of
5 agreement or not, but a discussion.

6 MR. GUTKOSKI: I'm happy to have a conversation with
7 opposing counsel regarding language. I think that both sides
8 have already presented language to the Court and the -- I
9 understood the record was closed in that regard; however, I'm
10 happy to have that conversation and see if we can come to some
11 sort of conclusion.

12 Did I understand the Court to say that you're
13 expecting to have rulings on the post-trial motions and the
14 entry of final judgment by the end of March?

15 THE COURT: Yes.

16 MR. GUTKOSKI: Okay. We'll -- we'll endeavor to do
17 that in the next week or so then.

18 THE COURT: Good. I appreciate it.

19 MR. WILSON: Your Honor, may I make one very quick
20 request?

21 THE COURT: Sure.

22 MR. WILSON: I certainly don't want to extend this any
23 further. In light of your Honor's position on the relevance of
24 some of this information, I would just like to reserve the
25 right to perhaps speak with our clients about whether or not

1 they would like a hearing to provide it --

2 THE COURT: Oh, absolutely.

3 MR. WILSON: I don't think doing it today is fair.

4 THE COURT: No, no, and so -- this was just a good
5 discussion, as it has always been. I mean, this is really very
6 important, and it certainly will have an impact on them; and if
7 at any time anybody wishes to be heard, again the beauty about
8 the new technology is we actually can do it. We're available
9 and we'll -- we'll make ourselves available at a convenient
10 time for everyone, and it won't have to be an in person.

11 MR. WILSON: Thank you.

12 So perhaps as part of the -- the status report, we'll
13 indicate to the Court whether or not the individual defendants
14 would like to comment on some of this.

15 THE COURT: Absolutely. All right.

16 MR. GUTKOSKI: If -- if there is to be the offering of
17 evidence, your Honor, because the information as to what they
18 did in April of '23 is in their possession, we would like --

19 THE COURT: Okay. Cart and horse, right?

20 MR. GUTKOSKI: Huh?

21 THE COURT: So you're putting a cart before the horse
22 in this case. So we're not going to -- if that's going to
23 happen there, clearly there will be an exchange of discovery or
24 a different discussion, okay, so.

25 MR. GUTKOSKI: Thank you.

1 THE COURT: All right. Thank you all very much. Good
2 to see you all, and enjoy Worcester while you're here. All
3 right.

4 MR. RITCHIE: Thank you, your Honor.

5 MR. WILSON: Thank you, your Honor.

6 (At 11:07 a.m., court was adjourned.)
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C E R T I F I C A T E

I, Marianne Kusa-Ryll, RDR, CRR, do hereby
certify that the foregoing transcript is a true and accurate
transcription of my stenographic notes before the Honorable
Margaret R. Guzman, to the best of my skill, knowledge, and
ability.

/s/ Marianne Kusa-Ryll
Marianne Kusa-Ryll, RDR, CRR
Federal Official Court Reporter

03-22-2024
Date